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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 137

MASSACHUSETTS TRUSTEES OF EASTERN GAS AND FUEL ASSOCIATES, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the district court (R. 5) and its supplementary findings of fact and conclusions of law (R. 26) are reported at 202 F. Supp. 297, and 210 F. Supp. 822, respectively. The opinion of the court of appeals (R. 247) is reported at 312 F. 2d 214.

JURISDICTION

The judgment of the court of appeals (R. 260) was entered on January 8, 1963. The petition for a writ of certiorari was filed on May 16, 1963, and was granted on October 14, 1963 (R. 262). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Petitioners ("Eastern") entered into contracts with the Maritime Commission for the chartering of government vessels in 1946. The charters provided that Eastern would pay, on a sliding scale, from 50 to 90 percent of any excess profits. Subsequently, in August 1947, pursuant to a provision in the charters allowing it to terminate on 15 days' notice, the Commission told Eastern that the charters would be terminated unless it agreed to new charters which provided for the same rates but for an altered method of accounting. Eastern agreed.

The questions presented are:

1. Whether Eastern is precluded from contesting the validity of the charters (both old and new) since it voluntarily agreed to them and benefited from them.

2. Whether Eastern may avoid express provisions, common to both the old and new charters, that the profit-sharing rental shall vary from 50 to 90 percent of excess profits, on the ground (1) that Section 709(a) of the Merchant Marine Act of 1936 provides that the Commission shall collect 50 percent of excess profits and this section precluded the Commission from entering into a contract providing for a higher rate of profit sharing under Section 5(b) of the Merchant Ship Sales Act of 1946; or (2) that, even if Section 709(a) does not limit the Commission's powers under Section 5(b), the profit-sharing provisions were based on Section 709(a) rather than Section 5(b).

3. Assuming, *arguendo*, that the Commission was precluded from entering into such charters with Eastern, whether the United States is nevertheless

entitled to compensation *quantum valebat* for Eastern's use of government vessels.

4. Whether Eastern may avoid the accounting provision of the new charters, *i.e.*, that there shall be separate calculation of profit-sharing rentals after September 1, 1947, on the ground that the new agreement was coerced and that its effect was to divide 1947 into two parts for profit-sharing purposes while Section 709(a) provides for "calendar year" accounting.

STATUTES INVOLVED

The pertinent provisions of the Merchant Ship Sales Act of 1946 and of the Merchant Marine Act of 1936 are set forth in the Appendix, *infra*, pp. 46–49.

STATEMENT

Congress enacted the Merchant Ship Sales Act on March 8, 1946, authorizing the United States Maritime Commission to sell or charter vessels constructed for the government during World War II. Since the primary object of the Act was to sell vessels, chartering was delayed and discouraged.

1. *Chartering under the Merchant Ship Sales Act of 1946.*—Pending implementation of the Maritime Commission's authority to charter governments vessels under the 1946 Act, the War Shipping Administration ("WSA") engaged in an interim program, designed as an experiment, to test the rate suitable for chartering (R. 44–45).[1] WSA devised a standard

[1] WSA was authorized to charter out government vessels under Public Law 101, 77th Cong., 1st Sess., 55 Stat. 242 (1941), and Executive Order No. 9054 (7 Fed. Reg. 837 (1942)).

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charter ("Form No. 203," 11 Fed. Reg. 4669 (1946)) which specified a rental composed of two elements: (a) a "basic charter hire" consisting of a low, firm monthly amount, and (b) an "additional charter hire" consisting of one-half of any net profits in excess of a 10 percent annual return on the charterer's capital investment.

During the interim period, a Special Charter Committee composed of several senior officials of the Maritime Commission was developing provisions for chartering under the 1946 Act. Studies showed that postwar freight rates generally were high (R. 52), and that many shipping operations were extremely profitable and had resulted in exorbitant returns to WSA charterers (R. 49, 53), although other operations were less remunerative (R. 49, 55). All members of the Committee agreed that government vessels were being rented too cheaply under the low WSA rates and that higher rentals were necessary to promote the sales policy of the 1946 Act (R. 143, 148). They said that the Commission's duty, as the government's "prudent businessman," [2] was to determine the most equitable and satisfactory method for accomplishing that result (R. 143–149).

A majority of the Committee agreed that imposition of a firm rental substantially higher than that utilized

[2] Section 713 of the Merchant Marine Act of 1936 (46 U.S.C. 1203) was made applicable to chartering under the 1946 Act by Section 5(c) of the latter statute (50 U.S.C. App. 1738(c)). Section 713 required the Commission to consider, in chartering, "factors that would be considered by a prudent businessman in entering into a transaction involving a large investment of his capital * * *."

by WSA[3] might possibly be unfair to some prospective 1946 Act charterers, since a few operations were relatively unremunerative and freight rates fluctuated (R. 55–56). It was accordingly recommended that the Commission utilize a low firm rental similar to that charged by WSA, but that the contingent profit-sharing rental be greater than the 50 percent profit-sharing rate which was being used by WSA and which was required by Section 709(a) of the Merchant Marine Act of 1936.[4] Recommendations for such contingent profit-sharing rates ranged from 66⅔ percent to 90 percent (R. 144, 149).

The Commission considered these recommendations pursuant to the direction of Section 5(b) of the 1946 Act that it establish a rate "consistent with the policies" of the Act, and elected to adopt a modified form of the majority proposal. On August 9, 1946, it selected as the proper rate a combination of a min-

[3] WSA's primary "basic charter rate," although expressed in terms of a flat monthly dollar amount, was equal to 15 percent per annum of the mean of the unadjusted statutory sales price and the "floor price" of the vessels as determined under Section 3 of the 1946 Act (50 U.S.C. App. 1736) (R. 53).

[4] The rationale was expressed as follows: "The charterer is in better position on a low basic charter [hire] and a high recapture [profit-sharing hire] than he would be if the position were reversed because in the first instance a more liberal portion of the overall charter hire is payable out of profits, if earned, whereas, in the second instance, a much greater charter hire would be paid whether there were *any* profits or not" (R. 154–155). A higher firm rental "imposed much greater risks of loss on the charterers" (R. 149) whereas a higher contingent rental would enable both the Commission and the charterers to adapt "to the fluctuations of world market rate[s]" (R. 146).

imum firm rental (15 percent per annum of the unadjusted statutory sales price or the "floor price" of the vessel, whichever was higher) and profit sharing of from 50 to 90 percent of the charterers' excess net profits (R. 64–72). The Commission advised the WSA charterers, including Eastern, of the rate thus selected (R. 85–86).

On September 4, 1946, the Commission formally approved the terms of the standard charter to be used in chartering under the 1946 Act ("Form No. 303," 11 Fed. Reg. 9936 (1946)). Clauses C(1), 12 and 13 contain the firm and profit-sharing rental provisions selected on August 9, 1946, and are identical with those subsequently agreed to by Eastern (R. 181–184).

2. *Eastern's Original Charter Under the 1946 Act.*— Prior to the Commission's formulation of chartering terms under the 1946 Act, Eastern applied for the use of a single vessel (R. 202–203). After the "Form No. 303" charter rates were announced, it specifically and unqualifiedly accepted them (R. 206), executing the charter on November 7, 1946 (R. 180–182).

In addition to the single vessel originally chartered, Eastern requested and obtained nine other government vessels at the same rates and under the same terms (R. 186, 188, 190, 192, 194, 196). At no time did Eastern object to the rental provisions of its charter (R. 178). None of its many accountings for, and payments of, the profit-sharing rental was accompanied by any protest or intimation of dissatisfaction (R. 176–

180).[4] Far from objecting to the provision for payment of a graduated scale of excess profits, Eastern twice urged that the Commission permit it to use a particularly desirable government vessel for 100 percent of all profits plus an additional $200,000 (R. 208–210). More than two years after termination of the charter, Eastern filed a final accounting, calculated the profit-sharing rental in accordance with Clause 13, and submitted an accountant's certificate attesting to its correctness (R. 220–226).

3. *The Addendum Agreed to by Eastern.*—Although the profit-sharing rental under "Form No. 303" charter was higher than that previously charged by WSA under "Form No. 203," rising market conditions encouraged increased private use of government ships and the number of chartered vessels more than doubled between August 31, 1946, and June 30, 1947 (R. 159). In reluctantly reporting out legislation to continue the Maritime Commission's chartering authority, the responsible Congressional committees said in June 1947 that they were doing so with the understanding that both the firm and profit-sharing rentals "will be immediately increased" so as to discourage chartering (R. 157–158). S. Rep. No. 392, 80th Cong.,

[4] While certain industry associations had earlier suggested alternative profit-sharing rentals and had argued that the proposed rates were excessive (R. 154–155), nothing in the record shows that Eastern was a member of these associations, ever subscribed to that view, or made any protest whatsoever until February 15, 1955 (R. 179)—more than eight years after execution of the charter and more than seven years after chartering had terminated.

1st Sess. 3 (1947); H. Rep. No. 725, 80th Cong., 1st Sess. 2 (1947).

Shipping interests reacted immediately. Owners of private vessels complained of decreasing shipping rates and of government over-chartering (R. 159–160). Charterers of government vessels complained that the falling market would not sustain increased Commission rates (R. 161–163).

On August 14, 1947, the Commission decided to exercise its right to terminate all existing "Form No. 303" charters in accordance with contract terms permitting cancellation on 15 days' notice (R. 163, 184). When the charterers were so advised (R. 233), they urged that the Commission continue to charter on new terms in order to protect the charterers from loss of highly remunerative subcharters (R. 164–165). On August 20, 1947, the Commission advised Eastern and others that the previous termination notice would remain effective except as to those charterers who desired to accept an addendum to the charter ("Foreign Trade Addendum") (R. 165). The addendum stated that it replaced the original charters, provided for continuing the firm and profit-sharing rates in the original charters, but called for separate calculation of profit-sharing rentals after September 1, 1947 (R. 165, 234–236). The latter provision was designed to prevent charterers from offsetting any future losses against the high excess profits they had received before September 1, 1947 (R. 166).

Eastern promptly accepted the Commission's offer without qualification (R. 237), executed the addendum

to the charters (R. 198–201), continued to operate chartered vessels, submitted accountings thereunder, and made no protest until it filed the libel in this case seven years later (R. 175–179). As a result of the addendum, Eastern did not receive credit for losses it incurred after September 1, 1947, for purposes of computing the profit-sharing rental for excess profits earned before that date (R. 112).

4. *The Decisions of the Courts Below.*—Eastern filed a libel on May 10, 1955, for recovery of some $260,000 collected by the Maritime Commission under the allegedly illegal profit-sharing provisions and the addendum (R. 5). Eastern claimed that the profit-sharing rental was invalid because the Merchant Marine Act of 1936 provided that charters with the Commission shall provide for the payment of 50 percent of excess profits. They argued that the new charter was likewise illegal because the Merchant Marine Act provided for "calendar year" accounting while the addendum provided for dividing the year 1947 into two parts in computing the profit-sharing rental. The government cross-libeled for approximately $64,000 in charter hire still owing under the terms of Eastern's contracts (R. 7).* The district court sustained both the profit-sharing rental provision and the new charter (R. 5–33). Eastern's libel was therefore dismissed and judgment was entered on the government's cross-libel (R. 34–35).

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* Three additional causes of action were asserted in the cross-libel. One was dismissed on the merits and two were settled by the parties (R. 34–35).

The court of appeals affirmed (R. 260–261). Observing that the charter was an integrated agreement and that the Commission "had a single, overall obligation to fix a charter hire" (R. 251–252), the court found no significance in the Commission's choice of a rental combining firm and contingent rates. It assumed that the Commission had determined the firm portion of the rental to be consistent with the statutory policies only if "accompanied by the contingent obligations" (R. 253), and held (R. 259) that the Commission therefore had authority to require payment of more than 50 percent of profits.

The court below similarly rejected Eastern's attack on the new addendum. Since the original charter was terminable at will (R. 259), the Commission's exercise of that power and the grant of a new charter on different terms did not violate the statute (R. 260).

SUMMARY OF ARGUMENT

I

Eastern agreed to the charters, which they now claim the Maritime Commission had no authority to enter, and accepted the benefits of them. Numerous decisions of this Court make clear that if a party elects to proceed under a contract, it cannot later claim that the government did not have statutory authority. *E.g., Matson Navigation Co.* v. *United States*, 284 U.S. 352, 357, 358. Consequently, whatever validity Eastern's contentions might have on their merits, Eastern has waived any rights it had.

II

Congress gave the Maritime Commission full authority in Section 5(b) of the Merchant Ship Sales Act of 1946 to devise rates for the private chartering of government vessels which "the Commission determines to be consistent with the policies of this Act"—*i.e.*, the promotion of sales rather than charters. Section 5(b) specified a minimum firm rate below which the Commission could not exercise discretion, but did not specify any maximum firm rate or prohibit a contingent profit-sharing rate. Section 709(a) of the Merchant Marine Act of 1936, which is made applicable under the 1946 Act, requires that charterers pay one-half of any excess net profits. However, its rental provision did not limit the Commission's right and duty under Section 5(b) to establish rentals promoting the policies of the 1946 Act, and therefore the Commission could properly agree to a profit-sharing rental of over 50 percent.

The Commission and Eastern agreed to rates composed of a low firm rental plus a contingent profit-sharing rental of over 50 percent of excess profits when excess profits were above a certain amount. In so doing, the Commission attempted to further the sales policy of the 1946 Act while protecting prospective charterers from the risks of a high firm rental. The Commission has consistently interpreted its authority to allow profit-sharing rentals of over 50 percent and this interpretation has been approved by Congress.

The charter was not invalid because it did not specify that the profit-sharing rental of over 50 percent was based on Section 5(b) rather than 709(a).

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It seems obvious that the Commission was proceeding under Section 5(b), since Section 709(a) requires only a 50 percent rate. But, in any event, it is irrelevant under which section the Commission might have thought it was proceeding. Since the Commission had authority to agree to the profit-sharing rate, the charters were valid.

III

If the rental provisions in the charters are held to be invalid, Eastern is still not entitled to the rental of the vessels at the low firm rates. Instead, since one of two complementary rental provisions would be invalid, the United States could recover the value of the vessels' use on a theory of unjust enrichment. *E.g., Clark* v. *United States,* 95 U.S. 539. Since market chartering rates were higher than the rentals paid by Eastern, it would be liable for at least as much as the payments required under the charters.

IV

The addendum by which the Commission and Eastern agreed to replace the original charters was valid. Both parties had the right to terminate the original charters on 15 days' notice. Consequently, the Commission could properly inform Eastern and the other charterers that the charters would be terminated unless a new agreement was made, whether or not the Commission was attempting to obtain a new contract more favorable to the government.

The addendum did not violate the provision of Section 709(a) providing that the payment of 50 percent of excess profits should be computed on a calendar-year basis. While the addendum resulted in splitting the year 1947 for profit-sharing purposes, Section 709(a) applied only to single charters whereas the addendum was explicitly a separate charter for accounting purposes. In any event, since Section 709(a) merely provided a minimum profit-sharing rate in order to protect the government, it did not confer any rights on charterers.

ARGUMENT

Eastern entered into an agreement with the Maritime Commission to charter vessels from the latter in return for a firm rental plus a share of excess profits (a sliding scale of 50 to 90 percent, depending upon the volume of the profits) earned under the charters. Eastern now challenges these charters on the ground that the Commission had no authority to agree to them. We argue at the threshold that Eastern is estopped from challenging the contracts to which it agreed and from which it benefited. We urge further that the Commission did have authority under the Merchant Ship Sales Act of 1946 to enter the agreements in question.

I

EASTERN HAS WAIVED ANY RIGHT TO CHALLENGE THE AUTHORITY OF THE COMMISSION SINCE IT VOLUNTARILY AGREED TO THE CHARTERS AND BENEFITED FROM THEM

Eastern accepted the charters that it now seeks to challenge, without duress or coercion (as to the addendum, see pp. 38–43 below). Under these circumstances, Eastern should not be permitted to contend that the terms were beyond the discretion conferred by statute on the Maritime Commission. To allow Eastern to have the benefit of the contract without being bound by its burdens would confer on it an unearned windfall as compared to those who chartered vessels on the same basis and lived up to the terms of their commitments.

One cannot invoke the discretion of a federal agency, receive benefits through the exercise of that discretion, and then seek greater benefits by asserting that the original exercise of agency discretion involved a method of computation which was in violation of the statutory authority under which the agency acted. *Callanan Road Co.* v. *United States,* 345 U.S. 507, 513; *Commissioner* v. *National Lead Co.,* 230 F. 2d 161, 163–164 (C.A. 2), affirmed on other grounds, 352 U.S. 313; cf. *Federal Power Commission* v. *Colorado Interstate Gas Co.,* 348 U.S. 492, 497–498; *United States* v. *Edmondston,* 181 U.S. 500, 515. In *Matson Navigation Co.* v. *United States,* 284 U.S. 352, 357–358, this Court held that, if a party elects to proceed under a contract with the United States, it should be bound by its terms even where a constitu-

tional as well as a statutory right is involved. Similarly, one cannot accept benefits under a contract or acquiesce in its terms and later claim that the terms of the statute under which the contract was authorized have not been followed. *Stearns Co.* v. *United States,* 291 U.S. 54, 61–62; *Louisville & Nashville R.R. Co.* v. *United States,* 267 U.S. 395, 401–402; *American Smelting Co.* v. *United States,* 259 U.S. 75, 78–79; *Oregon-Wash. R.R. Co.* v. *United States,* 255 U.S. 339, 345; *Parish* v. *United States,* 8 Wall. 489, 490; *Gibson* v. *Lyon,* 115 U.S. 439, 447–448; *Thredgill* v. *Pintard,* 12 How. 24, 38; *St. Louis Hay & Grain Co.* v. *United States,* 191 U.S. 159, 164; *Silliman* v. *United States,* 101 U.S. 465, 469–471. As this Court said in *Parish* v. *United States, supra,* 8 Wall. at 490:

> If the claimants had any objections to the provisions of the contract they signed, they should have refused to make it. Having made it, and executed it, their mouths are closed against any denial that it superseded all previous arrangements.'

In short, having agreed to the charters and accepted the benefits, Eastern has waived any claims it might

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' Eastern's libel, as opposed to the government's cross-libel, is also without merit because it is barred by the statute of limitations (46 U.S.C. 745) and because Eastern voluntarily paid the Commission. See *American-Foreign Steamship Corp.* v. *United States,* 291 F. 2d 598 (C.A. 2), certiorari denied, 368 U.S. 895. These defenses were pleaded by the government, but no evidence was introduced as to them by either party since the hearing was confined to the issues now before this Court. Consequently, if this Court were to reverse the judgment in favor of the government, the government's defenses would remain for consideration by the district court on remand.

have had that the charters were beyond the authority of the Commission.[8]

II

THE COMBINATION OF FIRM AND PROFIT-SHARING RENTALS WAS AUTHORIZED BY SECTION 8(b) OF THE MERCHANT SHIP SALES ACT OF 1946

The Merchant Marine Act, 1936, provided for the chartering of subsidized vessels. Section 707, 46 U.S.C. 1197, gave the Commission authority to charter vessels "to the bidder proposing to pay the highest monthly charter hire," unless the Commission con-

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[8] In addition, Eastern never challenged either the original or substituted charters until it brought this libel over seven years after the substituted charter was terminated. It made no protest in making numerous accountings and payments to the Commission. Indeed, on two separate occasions, Eastern urged the Commission to charter to it particularly desirable vessels on the basis that Eastern would pay more than the contingent rental of 50 to 90 percent of excess profits in the charters involved here—*i.e.*, that it would pay 100 percent "of *all profits* and $200,000 additional to the Commission" (R. 208, 210).

The district court found that Eastern protested the profit-sharing rate in the original contract individually and as a member of a trade association (R. 13), in contrast to its finding that Eastern made no protest as to the substituted charters (R. 33). However, this first finding is completely unsupported by the record. Eastern itself never protested the original contracts. While the American Merchant Marine Institute did protest (R. 154), there is no indication in the record that Eastern was a member of this association and even now Eastern makes no such claim (see Br. 7, 38–39). And even if Eastern had been a member, the protest of an industry association to a standard charter does not constitute the objection of a particular member to a particular contract to which it agreed.

sidered the offer too low or believed the bidder did not have the capital, credit, or experience to operate successfully. Section 709(a), 46 U.S.C. 1199(a), required, in addition, that the Commission include in charters the requirement that the hire include a contingent rental of 50 percent of excess profits as defined in that section.

After World War II, Congress passed the Merchant Ship Sales Act of 1946 providing for the sale, and, if this proved impossible at a fair price, the chartering of vessels built by the government during the war. The Act provided in Section 5(b), 50 U.S.C. App. 1738(b), that, with certain restrictions including Section 709(a) of the 1936 Act, chartering should be at rates determined by the Commission "to be consistent with the policies of this Act."

Once Congress has given government agents the power to charter vessels—which Congress did in the Merchant Ship Sales Act of 1946—the presumption is that the agents are to secure the best available terms. Therefore, the real question here is not whether Congress intended that the Commission agree to certain rentals but whether it intended to forbid the Commission from entering the charters involved here. "Where there is no prohibition of a particular type of contract and no direction to use a particular type, the contracting officers are free to follow business practices." *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110, 116. In short, Eastern has the burden of showing that Congress had prohibited the rental provisions which it attacks.

We will show, *first*, that Section 5(b) of the 1946 Act itself authorizes the rentals in question; *second*, that Section 709(a) of the 1936 Act was not violated by those rentals; and, *third*, that Congress specifically approved of the consistent administrative practice involved in these cases.

A. SECTION 5(b) OF THE 1946 ACT AUTHORIZED THE COMMISSION TO ENTER CONTRACTS PROVIDING FOR A FIRM RENTAL, PLUS A PERCENTAGE OF EXCESS PROFITS

The authority of the Commission to set rentals for charters under the Merchant Marine Sales Act of 1946 comes from Section 5(b) of the Act. That Section directs the Commission to establish any rates which it determines "to be consistent with the policies" of the Act. The basic policy of the statute, as indicated by its title, was to promote the sale of ships; they were to be chartered only if sale proved impracticable. Section 5(a), 50 U.S.C. App. 1738(a), prohibited chartering vessels not previously offered for sale and Section 7(a), 50 U.S.C. App. 1740(a), required the Commission to prefer purchase applications over charter applications. Senate Report Number 807, 79th Cong., 1st Sess. 13 (1945), expressly stated: "Inasmuch as the policy of the measure is to put as many war-built vessels as possible into private ownership, the Commission is directed not to approve applications to charter unless such chartering is consistent with the policies of the act." See also H. Rep. No. 831, 79th Cong., 1st Sess. 3, 8 (1945). Consequently, the affirmative authority con-

ferred on the Commission by Section 5(b) was qualified only by the requirement that the rental be high enough to encourage ship sales—a policy inconsistent with any purpose to confer economic advantages upon charterers.

After affirmatively granting authority to the Commission, Section 5(b) goes on to impose two restrictions, both of which put a floor under charter rates. First, except upon the vote of four members of the Commission, the rate cannot "be less than 15 per centum per annum of the statutory sales price" of the vessel. Second, if the rate differed from 15 percent of the vessel's sale price, it was not to "be less than the prevailing world market charter rates for similar vessels for similar use as determined by the Commission."* The first of these restrictions expressly requires that the rental include a firm rate of a particular amount unless the Commission made an exception. In stating, however, that the rental shall not be less than this amount, the statute does not bar a higher rental or limit the form in which a higher rental may be prescribed. Nor does the second restriction prevent the Commission from exercising its authority to impose a higher rate, or limit the Commission in determining the proper form of such a rate. In short, Section 5(b) neither establishes a maximum rate nor limits the form of the rate; its

*The district court stated that this restriction applied only if the rate was less than 15 percent of the vessel's sale price (R. 22–23), but the language of the statute seems to make it apply to firm rates over 15 percent and to profit-sharing rates as well.

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manifest purpose was to keep rates up, thus encouraging sales. See *United States* v. *East Harbor Trading Corporation*, 190 F. Supp. 245, 248 (S.D. N.Y.); *American President Lines, Ltd.* v. *United States*, 265 F. 2d 552, 553 (C.A. 3), affirming 162 F. Supp. 732, 743 (D. Del.); *United States* v. *Eastport Steamship Corporation*, 216 F. Supp. 649, 653 (S.D. N.Y.).

The rentals involved in this case complied fully with the above provisions. The charters provided for a firm rental of 15 percent of the vessels' sales price. In addition, they included a contingent profit-sharing rate (50 to 90 percent of excess profits) calculated to implement the basic statutory policy.

Eastern claims (Br. 13) that a "profit sharing arrangement does not qualify as a 'rate' of bareboat charter hire * * * in any normally accepted sense." Since Section 5(b) gives the Commission authority only to establish rates, Eastern claims that the entire profit-sharing rental was invalid. Eastern's view, however, conflicts with established practices in the shipping industry. *Pan American Airways, Inc.* v. *Quiles*, 154 F. 2d 496 (C.A. 5); *Polar Steamship Corp.* v. *Inland Overseas S. Corp.*, 136 F. 2d 835, 837 (C.A. 4), certiorari denied, 320 U.S. 774; *The Nat E. Sutton*, 42 F. 2d 229, 231 (E.D. N.Y.).[10] A rental combining a minimum fixed amount with an additional profit-sharing rental is a common commercial device. Note, *The*

[10] See also *Barreda* v. *Silsbee*, 21 How. 146, 161; *Spring* v. *Gray*, 6 Pet. 151, 164–165; *Sproat* v. *Donnell*, 26 Me. 185, 187; *Felton* v. *Deall*, 22 Vt. 170; 18 L.R.A. (N.S.) 963, 1045–1046 (1909); Cooley, *Chartering and Charter Parties* (1947), 51.

Percentage Lease—Its Functions and Drafting Problems, 61 Harv. L. Rev. 317, 322 (1948); 38 A.L.R. 2d 1113, 1127 (1954); McMichael, *Leases; Percentage, Short and Long Term* (3d ed. 1925), *passim*; McMichael & O'Keefe, *Leases; Percentage, Short and Long Term* (5th ed. 1959), pp. 8, 34–36, 49. In addition, as we have seen, petitioners' argument ignores the express language of Section 5(b), which contains no indication that the Commission's discretion was confined to utilization of only a firm rental; rather, Section 5(b) allows, and in fact requires, the Commission to agree to rates "consistent with the policies of this Act."

B. THE PROVISION OF SECTION 709(a) OF THE 1936 ACT THAT THE COMMISSION REQUIRE PAYMENT OF 50 PERCENT OF EXCESS PROFITS DID NOT PRECLUDE THE COMMISSION FROM CONTRACTING FOR HIGHER PROFIT SHARING UNDER SECTION 5(b), NOR REQUIRE THE CHARTERS TO SPECIFY THAT THE HIGHER RATE WAS BASED ON SECTION 5(b)

Section 709(a) of the Merchant Marine Sales Act of 1936 did not give the Commission any affirmative authority to set rates. That authority was conferred by Section 707(a) which provided that subsidized vessels should be chartered to the highest bidder, so long as the Commission did not deem the rates too low or determine that the bidder lacked sufficient capital, credit, or experience to be successful. However, Section 709(a) limited the Commission's authority by requiring a rental of 50 percent of excess profits. As to war-built vessels chartered under the Merchant Ship Sales Act of 1946, Section 5(b), as we have seen, gave the Commission its basic authority in setting charter rates. Section 5(c) of the 1946 Act provides, moreover, that various sections of the 1936 Act (including Section

709(a)) shall be applicable to charters made under the later statute.

Section 709(a) requires that every charter entered into by the Commission include a provision that the charterer pay 50 percent of all profits beyond 10 percent of "the charterer's capital necessarily employed in the business of such chartered vessels." In our view, the contracts involved in this case are fully consistent; they provided for payment of 50 to 90 percent of excess profits, *i.e.*, more than the 50 percent which Section 709(a) required the Commission to include in all charters.

1. Eastern contends (Br. 12–32) that Section 709(a) precluded the Commission from contracting for a graduated profit-sharing rental of over 50 percent. As we have seen (pp. 18–21), Section 5(b), and not Section 709(a), gave the Commission authority to enter charters providing for profit-sharing rentals. That authority to agree to rentals which "the Commission determines to be consistent with the policies of this Act" allowed the Commission to have firm or contingent rentals. While Section 709(a) required that the Commission receive payment of at least 50 percent of excess profits, there is nothing in that Section to preclude the Commission from negotiating an agreement for payment of a greater proportion. In the absence of a clear statutory limitation, government agents may surely make a better bargain than Congress demands. *United States* v. *Edmondston*, 181 U.S. 500; *Gilbert & Secor* v. *United States*, 8 Wall. 358, 361.

This construction is consistent with the purposes of both Section 709(a) and Section 5(b). Eastern's own account of the legislative history of the 1936 Act (Br. App. B2–B5) shows that Section 709(a) was designed to prevent a give away (R. 257–258).[11] See *Seas Shipping Co.* v. *Commissioner*, 1 T.C. 30, 39. Thus, it provided for a minimum rental. It may have been true, as the court of appeals noted (R. 255), that the 50 percent of excess profits constituted, in practice, a maximum under the 1936 Act because Section 707(a) provided for award of charters to bidders paying "the highest monthly charter hire." Since this figure could only be computed from the firm rental offered, charterers had no incentive to offer a higher profit-sharing rate. Nonetheless, the purpose and legal effect of Section 709(a) in 1936 were to establish a minimum rental.[12] *A fortiori*, Section 709(a) only established a minimum when it was incorporated into the 1946 Act—an Act which gave the Commission itself the power to establish rates.

As already made clear, this construction of Section 709(a) is consistent with the clearly stated purpose of the Merchant Ship Sales Act of 1946—to promote ship sales rather than charters. Indeed, unless the Commission had power to increase the profit-sharing

[11] On the other hand, Eastern's legislative history is inconclusive at best as to whether Congress also intended to benefit charterers by establishing a maximum profit-sharing rental.

[12] Contrary to Eastern's statement (Br. 25), the court of appeals did not hold that the 50 percent rental in Section 709(a) was *legally* both a minimum and maximum under the 1936 Act (see R. 255).

rental above 50 percent of excess profits, it could not have met the requirement of Section 5(b) of the 1946 Act that rental rates be set so as to promote sales. As was noted in *American President Lines, Ltd.* v. *United States, supra,* 265 F. 2d at 553: "In all instances of charter hire the Commission had to refrain from contracting for hire which would be far less than the market could bear. For if the hire were made too attractive the pronounced policy to demise vessels outright would be thwarted. No prudent businessman would purchase a commodity which could be leased at a comparatively more favorable price." It is not disputed that the world market rate for annual charters, at the time of the charters in this case, was approximately 45.6 percent of the statutory sales prices (R. 151). Consequently, the firm rental provided by Section 5(b)—15 percent of statutory sales prices—obviously would have made purchases of vessels unattractive to potential buyers. While it is true that Section 5(b) allowed the Commission to set a higher firm rental, this would have interfered with the Commission's desire to protect charterers from losses when world shipping rates declined (see p. 5, note 4 above).[13] A profit-sharing rental on a graduated scale

[13] It is true that charterers, like the government, could terminate the charters on 15 days' notice (R. 184). However, this would presumably occur only if market conditions were seriously depressed. Moreover, it would result in government vessels being neither sold nor chartered, contrary to the purpose of Congress in passing the 1946. Consequently, a high profit-sharing, rather than a higher firm, rental was not only consistent with Section 5(b) but to the benefit of both charterers and the government.

enabled the Commission to encourage sales while still protecting charterers.[14]

Of the five decisions which have held that rental provisions calling for more than 50 percent profit-sharing may be invalid, four have agreed, or at least assumed, that Section 709(a) does not limit the Commission's powers under Section 5(b). *American Export Lines, Inc.* v. *United States*, 153 Ct. Cls. 201, 290 F. 2d 925; *American Mail Line, Ltd.* v. *United States*, 213 F. Supp. 152 (W.D. Wash.); *Dichman, Wright & Pugh, Inc.* v. *United States*, 144 F. Supp. 922 (S.D. N.Y.); *United States* v. *East Harbor Trading Corporation*, 190 F. Supp. 245 (S.D. N.Y.);[15] but see *American*

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[14] Eastern relies (Br. 16–17) on two "well-settled rules of statutory construction": that Section 709(a), not Section 5(b), governs because the former is the more specific statute and "where a statute directs a government agency to act in a specific manner, that direction includes a mandatory negative." Both these rules, however, are inapplicable. The first rule assumes, without helping to decide, the basic issue whether Section 709(a) conflicts with Section 5(b) at all. It is the government's position that the two are completely consistent since Section 709(a) only establishes a minimum rate (see pp. 21–24 above). And it is a principle of statutory construction to attempt to harmonize statutory provisions rather than to decide which governs when they conflict. The second rule does not apply since it is inconsistent with the language and purpose of both Sections 709(a) and 5(b) to read the former as prohibiting rentals above 50 percent of excess profits.

[15] More recently, a decision in the same district has held to the contrary. *United States* v. *Eastport Steamship Corporation*, 216 F. Supp. 649 (S.D. N.Y.). Earlier, in *Sword Line* v. *United States*, 228 F. 2d 344, 346, affirmed, 230 F. 2d 75 (C.A. 2), affirmed on other grounds, 351 U.S. 976, Judge Learned Hand hypothesized *arguendo* that Section 709(a) established a maximum profit-sharing rental.

President Lines, Ltd. v. *United States,* Admiralty Nos. 28426, 28705, N.D. Cal., October 10, 1963 (not yet reported) (see Pet. Br. App. A1–A15). These cases held that the profit-sharing rentals in the charters were based on Section 709(a), and that this section does not authorize such rentals at over 50 percent. However, with the exception of the *American President Lines* case, they proceed on the premise that Section 5(b) of the Merchant Ship Sales Act authorizes the Commission to contract for additional rental above 50 percent of excess profits.

2. Eastern also contends (Br. 33–42) that the profit-sharing provisions in the charters were invalid even if Section 709(a) does not bar such an arrangement when consummated under Section 5(b). Its argument, relying on the cases cited above, is that the rental provisions in these charters were invalid because they were based on Section 709(a), which does not authorize them, rather than on Section 5(b). The decisions adopt the view that Section 709(a) divides rental into two parts: "charter hire reserved in the charter" which is based on Section 5(b) and "additional charter hire" which is based on Section 709(a); that the firm rental in the charters constituted the "charter hire reserved in the charter" and thus exhausted the Commission's power under Section 5(b); and that the Commission had no authority to agree to a sliding rental of more than 50 percent under Section 709(a).

Whether the Commission intended the profit-sharing rental to be based on Section 709(a) is, we submit, irrelevant. Admittedly, Section 709(a) did not pro-

vide affirmative authority for a profit-sharing rental of over 50 percent. But, as we have seen (pp. 18–21), Section 5(b) did give the Commission this power. Neither section required that rental provisions be based specifically on one of the two sections. The validity of the rental provisions therefore does not depend on what the Commission thought was the proper source of its authority. As the court of appeals stated, "To say that the Commission stultified itself by its choice of format is to elevate semantics above substance" (R. 252).

Eastern responds (Br. 41–42) that a reviewing court must judge the legality of administrative action by reference to the grounds of the agency's determination. This is doubtless true where the agency has exercised discretion and this determination depends on *its* view of the applicable law. If the agency misconstrues the law relating to the legal standards governing its discretionary action, the action is necessarily infected with the error. Looking to the wrong source of authority, however, where the standards are the same, has no such consequences. Here, even if the Commission did rely on Section 709(a) and not 5(b) in agreeing to the profit-sharing rate of over 50 percent, its determination could not have been affected. Section 709(a) sets up no criteria for establishing a rate different from Section 5(b). On the contrary, Section 709(a) of the 1936 Act is applicable only because it has been specifically incorporated into the 1946 Act. Therefore, the determination under Section 709(a) would be governed by Congress' purpose under the 1946 Act—the same standard specifically applica-

ble under Section 5(b). In the words of the district court, "Nor is there the slightest ground for assuming that if the Commission had been apprised of the correct source of its authority, the Commission or the other party would have made a contract different in substance as distinguished from wording" (R. 19).

We point out additionally that there is nothing in the charters stating that the profit-sharing provisions were based on Section 709(a) rather than Section 5(b). The only possible indication that the firm rental was based on Section 5(b) and the profit-sharing rental on Section 709(a) comes from the labels placed in the charters on the two forms of rental. The profit-sharing rental is labelled "Additional Charter Hire" (R. 10), the same as the phrase used by Section 709(a) in prescribing the 50 percent rental. On the other hand, the charters label the firm rental as "Basic Charter Hire." In contrast, Section 709(a) calls the rental not required by that section, *i.e.*, that based on Section 5(b), "the charter hire reserved in the charter" and Section 5(b) itself terms the rental, which the Commission may agree to under its authority, simply "charter hire." Thus, the charters give little basis for deciding whether the profit-sharing rental is based entirely on Section 709(a) or is based (at least in part) on Section 5(b).

If, as the contrary decisions and Eastern assert, the Commission's sole authority to agree to profit-sharing rentals of over 50 percent was derived from Section 5(b), it must be presumed that the contingent rate, insofar as it exceeded 50 percent, was

in fact based on that section and not Section 709(a). Surely, it cannot be assumed that the Commission intended to base a rate of 50 to 90 percent on a section explicitly providing authority for only a 50 percent rate. Any other conclusion would violate the long-established presumption of administrative regularity. *E.g., United States* v. *Rock Royal Co-operative, Inc.*, 307 U.S. 533; *United States* v. *Chemical Foundation*, 272 U.S. 1, 14–15. Moreover, the obvious intent of the parties was to have an overall rental consisting of a firm rental plus 50 to 90 percent of excess profits. Surely, there was no need, from the standpoint of the parties, to segregate the contingent rental required by Section 709(a) from that which the Commission determined to be necessary under Section 5(b). It is therefore fully consistent with the statute and the charters to say that both the firm and contingent rentals, at least insofar as they exceeded 50 percent, were based on Section 5(b).

3. Eastern argues (Br. 43–46) that, even if graduated profit-sharing were permissible, the portion in excess of 50 percent must be computed under Section 709 separately from, and before, the 50 percent portion. In other words, if the applicable rate were 90 percent, 40 percent of the profit is first computed, and this is added to 50 percent of the remaining profits. The result is less than the amount as obtained by the simultaneous computation of 90 percent of the total excess profits.

Eastern's contention is erroneous for two reasons. First, it is true that Section 709(a) first provides

for the "payment of the charter hire reserved in the charter" before requiring that the Commission include in contracts the provision for payment of 50 percent of excess profits. This does not mean that, when a 90 percent rate is provided by the charter, 40 percent must be computed as "charter hire reserved in the charter" with the other 50 percent computed afterwards as the statutory charter hire. The statute does not compel a division of the two elements of payment. Instead, as we have seen (pp. 21–26), it has been complied with when the charter requires the payment of at least 50 percent of excess profits. Here, the Commission and Eastern agreed to the payment of more than 50 percent of excess profits based on a sliding scale. They did not segregate the statutorily required amount from the additional payment. Eastern's contention, which is not compelled by statute, would reduce the payments due contrary to the explicit agreement of the parties.[16]

In any event, Eastern's argument is no longer an issue in this case. The trial court did not determine the proper method of computing the Commission's right to profit-sharing rentals. This was done in a stipulation to which the parties freely agreed (R. 136–137).

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[16] Eastern cites (Br. 44) government briefs in this and another case and the testimony of a government witness in this case to support its claim. The errors in this case were promptly corrected by the government (R. 120–135) and Eastern did not dispute the explanation.

C. THE COMMISSION'S STANDARD CHARTER EXPLICITLY PROVIDES FOR A PROFIT-SHARING RENTAL OF OVER 50 PERCENT, HAS BEEN CONSISTENTLY SO INTERPRETED BY THE COMMISSION, AND HAS BEEN APPROVED BY CONGRESS

The Maritime Commission, after serious study and consideration (see pp. 3–6 above), adopted the standard charter involved in this case, which explicitly provides for a profit-sharing rental of over 50 percent. The charter has been consistently interpreted by the Commission, as well as by charterers, to provide for such a rental. Thus, the Commission has interpreted its statutory authority to authorize rentals of over 50 percent of excess profits. It is well established that, when a statute is ambiguous—even assuming that Section 5(b) is—considerable weight must be given to the interpretation of the agency which administers it. *E.g., United States* v. *Zucca,* 351 U.S. 91, 96; *Kern River Co.* v. *United States,* 257 U.S. 147, 153–154.

The Commission's standard charter and uniform interpretation have been approved by Congress.[17] The allegedly illegal rate was published in the Federal Register on September 10, 1946. 11 Fed. Reg. 9936. More important, Congress was repeatedly given specific and detailed information concerning the Commission's practice. *Hearings Before the Subcommittee on Ship Sales, Charters, and Lay-ups, House Committee on Merchant Marine and Fisheries,* 80th Congress, 1st Sess. 176–179, 571–573, 591 (1947);

[17] The district court in *American Mail Line, Ltd.* v. *United States,* 213 F. Supp. 152 (W.D. Wash.), erred in suggesting the contrary.

Hearings on Sale, Charter and Operation of Vessels Before the House Committe on Merchant Marine and Fisheries, 81st Cong., 1st Sess. 57, 69, 91; (1949).

The first of these hearings occurred only nine months after the Maritime Commission adopted the "Form No. 303" charter which is involved in this case, when Congress was considering legislation to extend the Commission's chartering authority under the Merchant Marine Sales Act of 1946. Industry representatives were heard by the House Merchant Marine and Fisheries Committee, the profit-sharing rental provisions of the charter were thoroughly discussed, and no questions were raised as to the Commission's authority to apply that device in a form providing for rentals of over 50 percent of excess profits. *Hearings Before the Subcommittee on Ship Sales, Charters, and Lay-ups, House Committee on Merchant Marine and Fisheries,* 80th Cong., 1st Sess. (1947). On the basis of this hearing, extension of the chartering authority was then recommended by the Committee (H. Rep. No. 725, 80th Cong., 1st Sess. 2 (1947); S. Rep. No. 392, 80th Cong., 1st Sess. 3 (1947)):

> * * * with the understanding that the basic rates for the charter of dry-cargo vessels and recapture [profit-sharing rental] rates will be immediately increased, thus encouraging the purchase rather than charter of these ships.

Even if Congress had not been advised that the Commission was already collecting more than 50 percent of excess profits, these committee reports amounted to an express direction to do so. On the

basis of these reports, Congress agreed to extend the Commission's chartering authority. 61 Stat. 190.

With each of the several successive extensions of the Commission's chartering authority under the 1946 Act, Congress considered the profit-sharing rental and determined that its continued use was necessary to meet the objectives of the Act. Authority to charter was extended on the basis that (H. Rep. No. 60, 81st Cong., 1st Sess. 2 (1949); S. Rep. No. 55, 81st Cong., 1st Sess. 2 (1949)):

> It is contemplated that the Maritime Commission will continue to sell, charter, and operate ships in accordance with existing procedures and without any change in its present policy.

See also H. Rep. No. 564, 81st Cong., 1st Sess. 3 (1949); S. Rep. No. 483, 81st Cong., 1st Sess. 4 (1949). The "existing procedures" and "present policy" included, of course, the contingent rental here attacked by Eastern. Thus, Congress, on the basis of knowledge and consideration of profit-sharing rentals and the reasons for their use, directed their continuation.

III

IF EASTERN CAN AVOID PAYING THE CHARTER HIRE FIXED BY THE CONTRACTS, IT IS OBLIGATED UNDER THE DOCTRINE OF UNJUST ENRICHMENT TO PAY QUANTUM VALEBAT FOR USE OF THE GOVERNMENT'S VESSELS

Eastern alleges that the charters were invalid insofar as one of two complementary rental provisions required payment of contingent hire greater than 50 percent of excess profits. It claims that

it is therefore required to pay only the firm rental, plus the 50 percent of excess profit prescribed by Section 709(a). Thus, it asks in effect that the rental provisions be rewritten so as to create a smaller total rental than that agreed to by the parties. However, even if Eastern's attack on the legality of the charters were correct, rescission, not reformation, is the proper remedy. As the trial court observed (R. 23–24), if a rental provision in the charter was unauthorized, the remedy would be charter rescission and payment, *quantum valebat*, of the fair rental value of the vessels.

Reformation is inapplicable when, as here, there was no mutual mistake. *Moffett, Hodgkins & Clarke Co.* v. *Rochester,* 178 U.S. 373, 384–385; *Hearne* v. *Marine Insurance Company,* 20 Wall. 488, 491. If the Commission exceeded its statutory authority in agreeing to the rental in the charters, the government, no less than Eastern, may now repudiate that illegal action and rescind the contract. *Steele* v. *United States,* 113 U.S. 128, 133–134. In these circumstances the United States may recover from Eastern what was improperly granted—the value of the vessels' use. See *United States* v. *Wurts,* 303 U.S. 414, 416; *Wisconsin Central R. Co.* v. *United States,* 164 U.S. 190, 205, 210; Restatement, *Restitution* § 46(a). For the government has fully performed under the allegedly invalid agreement.

The rule which we urge is directly supported by opinions of this Court. In *Clark* v. *United States,* 95 U.S. 539, a vessel was lost while operated by gov-

ernment employees under an oral contract to pay daily charter hire of $150. The owner sued to recover both the value of the vessel and the agreed rental. The trial court dismissed the action because the contract violated a statute expressly requiring such contracts to be in writing. This Court agreed that the form of the contract violated the statute, but nevertheless held for the vessel owner (*id.* at 542–543):

> We do not mean to say that, where a parol contract has been wholly or partially executed and performed on one side, the party performing will not be entitled to recover the fair value of his property or services. On the contrary, we think that he will be entitled to recover such value as upon an implied contract for a *quantum meruit*.
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> * * * * *
>
> Of course, the claimant is entitled to the value of the use of his vessel during the time it was in the hands of the government agents * * *.

Accord, *United States* v. *N.Y. & Porto Rico S.S. Co.*, 239 U.S. 88, 93; *United States* v. *Andrews*, 207 U.S. 229, 243; *St. Louis Hay & Grain Co.* v. *United States*, 191 U.S. 159, 164. See also Woodward, *Quasi Contracts* (1913), pp. 146–152, and the numerous cases cited therein.

While *Clark* dealt with a contract violating the statute of frauds—*i.e.*, with a contract bad as to form—the same principle of recovery for unjust enrichment has been applied by this Court to contracts which were in excess of the contractors' powers—*i.e.*, to *ultra vires* contracts. *Central Transp. Co.* v. *Pull-*

man's Car Co., 139 U.S. 24, 60; *Pullman's Car. Co.* v. *Transportation Co.*, 171 U.S. 138, 151. See also Woodward, *supra*, pp. 250–255. The rule applied in such cases is illustrated by *Hitchcock* v. *Galveston*, 96 U.S. 341, 350–351:

> It matters not that the promise was to pay in a manner not authorized by law. If payments cannot be made in bonds because their issue is *ultra vires*, it would be sanctioning rank injustice to hold that payment need not be made at all. Such is not the law. The contract between the parties is in force, so far as it is lawful.
>
> Having received benefits at the expense of the other contracting party, it cannot object that it was not empowered to perform what it promised in return, in the mode in which it promised to perform.

See also *United States* v. *Mississippi Valley Co.*, 364 U.S. 520, 566, note 22; *Willard Co.* v. *United States*, 262 U.S. 489, 494; *Crocker* v. *United States*, 240 U.S. 74, 81; *Parkersburg* v. *Brown*, 106 U.S. 487, 503.

Eastern contends that the Commission would not have chartered at a higher firm rental if it had known that the contingent rental of from 50 to 90 percent was not authorized. However, the fact that the total rate set by the Commission was greater than the firm rate plus 50 percent of excess profits strongly suggests that the Commission would have chartered at a higher firm rental had it known that the higher contingent rental was unauthorized. Moreover, as

we have seen (p. 32), Congressional committees directed the Commission to charge more, not less, rental.[18]

Eastern further argues (Br. 36) that a higher firm rate would have permitted it to charge higher voyage charter rates to government agencies. But all of Eastern's voyage charters (not just the two it obtained from the government (R. 241)) were necessarily negotiated after the rates here complained of had been included in Eastern's contracts. The voyage charter terms therefore reflected the rental Eastern had already agreed to pay the Commission, not the lesser rental Eastern now seeks.

If this Court rejects the government's position that the contingent rentals provided in the charters are valid (see pp. 16–33 above) but agrees that Eastern is responsible for payment on a theory of unjust enrichment, a determination would have to be made of the vessels' fair rental value. In *Clark* v. *United States*, 95 U.S. 539, 543, this Court itself determined that the rental agreed by the parties in an invalid contract was the proper measure for recovery based on unjust enrichment. On the other hand, the Court might deem it appropriate to remand this issue to the

[18] The Commission's decision not to increase the firm rate because of protests from other government agencies (see Pet. Br. 36–37, notes 41, 42) is not relevant to this case. That was in 1947 and 1948, long after the Commission had agreed to the rental here complained of. The Commission decided not to charge a higher firm rental in 1946 because of solicitude for prospective charterers. See p. 5, note 4 above.

district court for initial decision.[19] On remand, the world market rate for similar vessels might be regarded as the proper measure of Eastern's unjust enrichment. See *Costanzo Coal Min. Co.* v. *Weirton Steel Co.*, 150 F. 2d 929, 936 (C.A. 4), certiorari denied, 326 U.S. 765. Or that the contract rate agreed to by the parties might be deemed (see R. 23–24) to estop the government from obtaining the still higher world market rate. In any event, the rate agreed to by the parties would be strong evidence of the proper measure of the government's damages. *Clark* v. *United States, supra;* Restatement, *Contracts* § 347.

IV

THE NEW CHARTER SUBSTITUTED FOR THE ORIGINAL CHARTERS DID NOT VIOLATE THE MERCHANT MARINE ACT

In 1947, Eastern and the Commission agreed to an addendum to the original charters—the so-called "Foreign Trade Addendum"—which was in actuality a substitute for the original charters, effective as of September 1, 1947. The new charter changed the earlier agreement in several important respects: (1) it pro-

[19] If the district court decided not to use the rate agreed to by the Commission in the charter it would seem proper, under the doctrine of primary jurisdiction for the court to hold further proceedings in abeyance to permit the Commission an opportunity to determine such rates, for Section 5(b) of the 1946 Act provides that rates are to be "fixed by the Commission." See *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, 498–499; *United States* v. *Western Pacific Railroad Co.*, 352 U.S. 59, 62–70; *Farrell Lines, Inc.* v. *United States*, 308 F. 2d 582 (Ct. Cls.).

hibited either party from terminating the new contract prior to November 1, 1947; (2) it "cut-off" accounting for the profit-sharing rental as of September 1, 1947, and started a new accounting for profit-sharing rental with respect to all voyages commenced after the date; (3) it liberalized the old contract's definition of "net voyage profit"; and (4) it further defined "vessel lay-up expenses." Eastern does not object to all the new terms of the substituted agreement, but complains only of the provision starting a new accounting period for computing the profit-sharing rental. This attempt to retain those terms financially favorable to Eastern, but to attack the single provision which favored the government, is without merit.

A. THE RECORD SHOWS THAT THE COMMISSION WAS ACTING PURSUANT TO THE ORIGINAL CHARTERS IN ITS ACTIONS LEADING TO THE NEW AGREEMENT

Although the primary policy of the Merchant Ship Sales Act of 1946 was to sell, not charter, government vessels (see p. 18 above), chartering proved enormously profitable to most private operators, presumably because of an early post-war trend toward high freight rates. As a result, the number of vessels chartered by the government increased from 734 in August 1946 to 1,510 in June 1947 (R. 159). As was noted in *American President Lines, Ltd.* v. *United States*, 2[illegible] F. 2d 552, 553 (C.A. 3), "No prudent business man would purchase a commodity which could be leased at a comparatively more favorable price."

Observing that increased chartering was militating "against the accomplishment of the objectives of the

Ship Sales Act of selling war-built merchant ships," Congress directed that chartering rates be increased to encourage "the purchase rather than charter of these ships." S. Rep. No. 392, 80th Cong., 1st Sess. 2–3 (1947); H. Rep. No. 725, 80th Cong., 1st Sess. 2 (1947). Private owners and charterers then made conflicting recommendations to the Commission. The charterers opposed increased rates on the ground that a downward market trend was developing; the owners favored outright termination of all charters to preserve their ships from destructive competition (R. 159–163).

Considering all these factors, the Commission decided to exercise its right of charter termination, which was reserved to both parties in Clause 14 of the "Form No. 303" charter (R. 184). On August 15, 1947, it advised Eastern and the other charterers that their contracts were being terminated, but that the terms and conditions of new charters—with new accounting periods—would be announced. The charterers immediately protested; return of the vessels threatened the loss of lucrative voyage charters (R. 161, 164). They insisted that the Commission not require redelivery of the vessels, but permit continued chartering under substitute agreements (R. 164–165). This the Commission finally agreed to do.

On August 20, 1947, the Commission advised the charterers of a proposed substitute agreement (the "Foreign Trade Addendum") which the charterers could accept in lieu of outright termination (R. 234–236). Acceptance could cover all, or any lesser num-

ber of, the vessels then under charter, but as to vessels not included in a substitute agreement the original termination notice remained effective (R. 238). Eastern promptly accepted the Commission's offer without reservation (R. 237), and executed a substitute agreement (R. 198–201). No objection was made by Eastern until its libel was filed in this case some seven years later (R. 179).

Eastern contends (Br. 56) that the Commission coerced it into accepting the substitute charter. This is true only in the sense that the Commission stated that the charter would otherwise be terminated. Eastern, however, had agreed in the original charters that either party could terminate the charters on 15 days' notice. The government, in other words, proposed to do no more than exercise its reserved right.

Eastern also claims (Br. 49) that starting a new accounting period for the profit-sharing rental was designed by the Commission to prevent charterers from offsetting losses incurred during the rest of the year from previous excess profits. But the purpose of the termination clause was obviously to allow either party to terminate whenever it deemed it advantageous. The Commission decided to terminate unless Eastern and the other charterers would agree to new charters which would be just as profitable to the Commission as termination followed by rechartering. When the Commission did this, it was merely exercising a right to which Eastern had agreed. Contrary to Eastern's suggestion (R. 56), it was not violating either the letter or spirit of any law.

Eastern of course had a choice at the time it agreed to the new charters. First, it could have accepted the notice of termination and returned the vessels to the government. This action would have relieved it of any further obligation to pay rental to the Commission. Moreover, Eastern's subcharters with others provided for cancellation without liability in the event that the Commission terminated the charters. Second, Eastern had the option of retaining the government's vessels under the terms of the substitute agreement.

Eastern's selection of the second alternative—acceptance of the substitute agreement—was an everyday business decision. It presumably anticipated profits from that decision or it would not have made it. That future events proved disappointing provides no basis for ignoring the contract.

Eastern also claims (Br. 49) that "Maritime was not seeking a bona fide termination of the charters." This statement, however, is refuted by the record. Many charterers, unlike Eastern, decided not to agree to the substitute offer. Consequently, as a result of the Commission's termination of the original charters, 172 vessels were redelivered (R. 167). Eastern is in effect complaining that the Commission did not demand a complete termination of Eastern's charters and redelivery of the vessels before it agreed to the substitute charter. The Commission, however, pursued the course it did in order to save Eastern and other charterers the cost of redelivery and the loss of what they then considered profitable voyage charters.

(R. 164). Obviously, the procedure has no vice, and the fact is that Eastern joined in suggesting that the Commission follow it (R. 163).

B. THE ADDENDUM DID NOT VIOLATE THE REQUIREMENT OF SECTION 709(a) AS TO CALENDAR-YEAR ACCOUNTING

The new agreements provided for the computation of the profit-sharing rental separately from the computation of the same rental under the old charters. The result was to split the year 1947 for this purpose. Eastern argues (Br. 50–57) that the substitute agreement therefore violated the requirement of Section 709(a) of the Merchant Marine Act of 1936 for calendar-year accounting.

Section 709(a) is in terms limited to voyages performed under a single charter. Eastern ignores the fact that the substitute agreement was a new charter distinct from the original contract. This is shown by the language agreed to by the parties in the substitute agreement itself (R. 199):

> [T]his addendum * * * shall be treated for accounting purposes as if it constituted a separate charter between the parties.

At the least, the addendum constituted a new charter for purposes of computing the profit-sharing rental. The language of Section 709(a), upon which Eastern relies, is therefore inapplicable.

In addition, we have seen above (pp. 21–29) that Section 709(a) merely establishes a minimum rental of 50 percent of excess profits—computed on the basis of a calendar year—and that Section 5(b) confers on the Commission authority to provide for a higher profit-

sharing rental. Section 709(a) thus was designed to protect the government by requiring a minimum rental; it conferred no rights on charterers against the government. Consequently, even if the new charter were not separate from the old, the Commission had authority to agree to a single charter dividing a calendar year into two parts for accounting purposes.

The only statutory limitation is that the result must afford the government 50 or more percent of excess profits on a calendar-year basis. As Eastern emphasizes, the effect of dividing 1947 into two parts was to increase considerably the profit-sharing above 50 percent of excess profits for the year. The new charter therefore satisfied the statutory mandate.[20]

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[20] Eastern cites (Br. 51–53) the legislative history of the Merchant Marine Act of 1936 and a 1938 amendment to it as showing the intent of Congress to require the Commission to compute profit-sharing on a calendar-year basis. However, this history relates to subsidy recapture provisions, not to profit-sharing rentals. It shows that Congress provided for computation of subsidies on a five-year and ten-year basis, respectively, under the two acts because it did not want subsidies to depend on year-to-year fluctuations in earnings. In contrast, Section 709(a) of the 1936 Act provides for calendar-year accounting and has no legislative history underlying it which even suggests that the Commission could not contractually provide for a different accounting period.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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APPENDIX

The Merchant Ship Sales Act of 1946, 60 Stat. 41, as amended, 50 U.S.C. App. 1735–1746, provides in pertinent part as follows:

SEC. 5 [50 U.S.C. App. 1738]. (a) Any citizen of the United States and, until July 4, 1946, any citizen of the Commonwealth of the Philippines, may make application to the Commission to charter a war-built dry-cargo vessel, under the jurisdiction and control of the Commission, for bare-boat use. The Commission may, in its discretion, either reject or approve the application, but shall not so approve unless in its opinion the chartering of such vessel to the applicant would be consistent with the policies of this Act. No vessel shall be chartered under this section until sixty days after publication of the applicable prewar domestic cost in the Federal Register under subsection 3(c) of this Act.

(b) The charter hire for any vessel chartered under the provisions of this section shall be fixed by the Commission at such rate as the Commission determines to be consistent with the policies of this Act, but, except upon the affirmative vote of not less than four members of the Commission, such rate shall not be less than 15 per centum per annum of the statutory sales price (computed as of the date of charter). Except in the case of vessels having passenger accommodations for not less than eighty passengers, rates of charter hire fixed by the Commission on any war-built vessel which differ from the rate specified in this subsection shall not be less than the prevailing world market charter rates for similar vessels for

similar use as determined by the Commission.

(c) The provisions of sections 708, 709, 710, 712, and 713, of the Merchant Marine Act, 1936, as amended, shall be applicable to charters made under this section.

* * * * *

SEC. 7 [50 U.S.C. App. 1740]. (a) In exercising its powers under this Act and under other provisions of law with respect to the sale and charter of war-built vessels, the Commission shall give preference to citizen applicants over noncitizen applicants, and as between citizen applicants to purchase and citizen applicants to charter, shall, so far as practicable and consistent with the policies of this Act, give preference to citizen applicants to purchase. In determining the order of preference between citizen applicants to purchase or between citi- applicants to charter, the Commission shall consider, among other relevant factors, the extent to which losses and requisitions of the applicant's prewar tonnage have been overcome and shall in all cases, in the sale and charter of a war-built vessel, give preference in such sale or charter, as the case may be, to the former owner of such vessel, or to the person for whom the vessel was constructed but to whom delivery thereof was prevented by the United States. In determining the order of preference between noncitizen applicants to purchase, the Commission shall give preference to citizens of the Commonwealth of the Philippines, and in determining the order of preference between other noncitizen applicants to purchase shall consider the extent to which losses in prewar tonnage of the various member nations of the United Nations, incurred in the interests of the war effort, have been overcome, and the relative effects of such losses upon the national economy of such member nations.

* * * * *

SEC. 12 [50 U.S.C. App. 1745]. (d) All moneys received by the Commission under this Act shall be deposited in the Treasury to the credit of miscellaneous receipts. The provisions of sections 201(d), 204(b), 207, 209(a), and 905(c) of the Merchant Marine Act, 1936, as amended, shall apply to all activities and functions which the Commission is authorized to perform under this Act.

The Merchant Marine Act, 1936, 49 Stat. 1985, as amended, 46 U.S.C. 1101–1294, provides in pertinent part as follows:

SEC. 207 [46 U.S.C. 1117]. The Commission may enter into such contracts, upon behalf of the United States, and may make such disbursements as may, in its discretion, be necessary to carry on the activities authorized by this Act, or to protect, preserve, or improve the collateral held by the Commission to secure indebtedness, in the same manner that a private corporation may contract within the scope of the authority conferred by its charter. All the Commission's financial transactions shall be audited in the General Accounting Office according to approved commercial practice as provided in the Act of March 20, 1922 (42 Stat. 444): *Provided,* That it shall be recognized that, because of the business activities authorized by this Act, the accounting officers shall allow credit for all expenditures shown to be necessary because of the nature of such authorized activities, notwithstanding any existing statutory provision to the contrary. The Comptroller General shall report annually or oftener to Congress any departure by the Commission from the provisions of this Act.

* * * * *

SEC. 709 [46 U.S.C. 1199]. (a) Every charter made by the Commission pursuant to the pro-

visions of this title shall provide that whenever, at the end of any calendar year subsequent to the execution of such charter, the cumulative net voyage profits (after payment of the charter hire reserved in the charter and payment of the charter's fair and reasonable overhead expenses applicable to operation of the chartered vessels) shall exceed 10 per centum per annum on the charterer's capital necessarily employed in the business of such chartered vessels, the charterer shall pay over to the Commission, as additional charter hire, one-half of such cumulative net voyage profit in excess of 10 per centum per annum: *Provided*, That the cumulative net profit so accounted for shall not be included in any calculation of cumulative net profit in subsequent years.

* * * * * *

SEC. 713 [46 U.S.C. 1203]. In the awarding of charters, the Commission shall take in consideration the charterer's financial resources and credit standing, practical experience in the operation of vessels, and any other factors that would be considered by a prudent businessman in entering into a transaction involving a large investment of his capital; and the Commission is directed to refrain from chartering its vessels to any person appearing to lack sufficient capital, credit, and experience to operate successfully the vessel over the period covered by the charter.

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